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No. 89-1647

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

CARNIVAL CRUISE LINES, INC.,
Petitioner,
v.
EULALA SHUTE and RUSSEL SHUTE,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST

The Chamber of Commerce of the United States (the "Chamber") respectfully submits this brief *amicus curiae* in support of petitioner, Carnival Cruise Lines, Inc. ("Carnival").[1] The Chamber is the nation's largest federation of businesses, representing more than 180,000 companies as well as several thousand trade and profes-

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[1] Both petitioner and respondent have consented to the Chamber's filing of this brief, and the parties' consent letters are being filed simultaneously with the brief.

sional associations and state and local chambers of commerce. Ninety percent of the Chamber's members are businesses with fewer than 100 employees, and seventy percent have fewer than twenty employees. The Chamber also sponsors The Council of Small Business which seeks to promote the needs of small businesses.

The Chamber has surveyed many of its members in the manufacturing, wholesale, retail, and service industries and determined that, particularly as applied to small businesses, the decision of the United States Court of Appeals for the Ninth Circuit fails to accommodate the realities of the contemporary marketplace and will place prohibitive costs upon small businesses and the persons they employ. For these reasons, and as further set forth in this brief, the Chamber believes that the Ninth Circuit's ruling "offend[s] 'traditional notions of fairness and substantial justice,'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citations omitted), implicated by due process. As the principal voice of the American business community, the Chamber, together with its membership, has a strong interest in the outcome of this case.

STATEMENT OF THE CASE

This case arises from a Washington district court's exercise of *in personam* jurisdiction over petitioner, Carnival Cruise Lines, Inc., a Panamanian cruise line with its principal place of business in Miami, Fiorida. The case involves the Washington purchase of cruise tickets by respondents, Eulala and Russel Shute, from Carnival and the subsequent injuries the Shutes allegedly sustained in international waters during that cruise.

Carnival's ships do not make ports of call in Washington. Carnival's only contacts with Washington consist of placing advertisements for its cruises in newspapers, presenting seminars for travel agencies (including distributing brochures), and paying travel agencies a ten percent commission for tickets they sell. Carnival is not registered to do business in Washington, has never paid business taxes in the state, and does not maintain an office or bank account there.

After purchasing tickets from a Washington travel agency, the Shutes embarked from Los Angeles, California, upon Carnival's ship the M/V TROPICALE. While in international waters off the coast of Mexico, Eulala Shute was injured when she allegedly slipped on a deck mat.

The Shutes subsequently filed suit against the Miami-based Carnival in the United States District Court for the Western District of Washington, where the court dismissed the action for lack of *in personam* jurisdiction. *Shute v. Carnival Cruise Lines*, No. C86-1204D (W.D. Wash. June 25, 1987). On appeal, the United States Court of Appeals for the Ninth Circuit reversed, holding, *inter alia*, that an exercise of jurisdiction was consistent with the due process clause of the fourteenth amendment. *Shute v. Carnival Cruise Lines*, 897 F.2d 377 (9th Cir. 1988).

SUMMARY OF ARGUMENT

This Court should reverse and remand the decision of the United States Court of Appeals for the Ninth Circuit as violative of the due process clause of the fourteenth amendment. Building upon a constitutional precipice that would permit exercise of universal jurisdiction over any business advertising in a national media, the "but for" test adopted by the Ninth Circuit for applying the second prong of the specific jurisdiction standard vitiates the distinction between general and specific *in personam* jurisdiction because it (1) ignores the fundamental exchange of benefits and obligations between a defendant and the forum that forms the basis of specific jurisdiction, and (2) in effect permits exercise of general jurisdiction over a defendant in the absence of

a defendant's continuous and systematic presence in the forum.

The Ninth Circuit's decision further violates due process standards in that, particularly as applied to small businesses, the decision permits an exercise of jurisdiction far beyond the jurisdictional risk a defendant assumes based on its contacts with the forum. This violation of standards of fair play and substantial justice is compounded by the Ninth Circuit's contravention of important due process limitations on state power effected through protection of individual liberty interests. The Ninth Circuit's disregard of these limitations on state power permits jurisdictional overreaching by a forum state, does not protect the power of non-forum states, and thereby fails to ensure the just and orderly administration of the laws. Finally, if not reversed, the Ninth Circuit's decision, through disregarding the locus of the exchange of goods and services, will have substantial detrimental impact on small businesses, in contravention of long-standing national policy as well as this Court's mandate that exercise of jurisdiction adapt to the contemporary market place.

In fashioning a test for application of the second prong of the specific jurisdiction standard that satisfies the constitutional minimums of due process, this Court should look to the fundamental exchange of benefits and obligations between a defendant and the forum that provides the basis for specific jurisdiction. This necessarily includes consideration of the jurisdictional risk the defendant assumed, due process limitations on state power that ensure orderly administration of the law, and the need to adapt the law to the contemporary marketplace The test should be whether the defendant, through his purposefully directed activities to residents of the forum, may be deemed to have assumed the risk of the litigation in the forum. This test should look not merely to whether the defendant subjectively consented to jurisdiction, but to whether, through the defendant's activities, a similarly situated defendant reasonably would have anticipated the risk of the litigation in the forum. In applying this standard, the parties should be afforded an opportunity to present to the trial court those facts that bear upon Carnival's assumption of the risk of the litigation in Washington. For these reasons, the Court should reverse the Ninth Circuit's decision and remand the case for further proceedings.

ARGUMENT

I. THE COURT SHOULD REVERSE THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AS VIOLATIVE OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

A. The Ninth Circuit's Decision Impermissibly Shifts the Jurisdictional Center of Gravity Away from the Locus of the Exchange of Goods and Services

A court acting pursuant to a state long-arm statute may exercise either general or specific *in personam* jurisdiction over an absent defendant. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 nn. 8-9 (1984). A court may exercise general jurisdiction over a defendant for any cause of action if the defendant has a "continuous and systematic" presence in the forum. *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 438 (1952). Where, as here, a defendant does not have a "continuous and systematic" presence in the forum, a court may exercise specific jurisdiction over the defendant where "the defendant [1] has 'purposefully directed' his activities at residents of the forum . . . and [2] the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *Keeton*

v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984), and *Helicopteros Nacionales de Colombia*, 466 U.S. at 414).

The two prongs of the specific jurisdiction standard are not independent: to determine whether the litigation arises out of or relates to a defendant's forum activities under the second prong of the standard, it is necessary first properly to characterize under the first prong of the standard what those activities are. It is here that the Ninth Circuit first falters. Through mischaracterizing under the first prong of the specific jurisdiction standard the essential nature of Carnival's activities in Washington, the Ninth Circuit fashions a test for the second prong of the standard that ultimately contravenes the fourteenth amendment.

Carnival's activities in Washington reflect the fundamental fact that it does not exchange goods or services there. Carnival's activities as they affected the Shutes were limited to advertising, presenting seminars for travel agencies, and mailing tickets to passengers who purchased them through third-party travel agencies. Such activities were at best incidental to providing goods and services elsewhere. Placing advertisements, in today's modern commercial environment, can hardly be viewed as substantial activity in Washington, inasmuch as the Shutes could have as easily seen the same advertisement in an out-of-state newspaper sold in the Seattle airport or available in their local library. Similarly, Carnival's seminars could have as effectively been held in another state, and Carnival's mailing tickets to the Shutes postmarked from Florida merely reinforced the fact that Carnival was *not* doing business in Washington.

Conversely, the Shutes had no reasonable expectation that goods or services were being exchanged in Washington. The Shutes traveled to Los Angeles to embark; their cruise took place largely in international waters, where Mrs. Shute's injuries allegedly occurred. In fact, the Shutes' only Washington activity related to their

Carnival cruise occurred when they purchased tickets from a third-party travel agency.[2]

Such incidental contacts with a forum are not unique to Carnival but are representative of wide-spread practices among the Chamber's members. The conduct of business, through the integration of technology, routinely traverses jurisdictional boundaries where no party to the transaction is doing business. Telefaxes and telecommunications are ubiquitous. Satellites now convey television and its advertising far beyond the local jurisdiction where it originally was broadcast.

Consistent with this Court's decisions, such incidental forum contacts like Carnival's here cannot be permitted to shift the jurisdictional center of gravity away from the locus of the exchange of goods and services. As this Court has recognized, merely entering a contract, *Burger King*, 471 U.S. at 479; *Rosenberg Bros. v. Curtis Brown Co.*, 260 U.S. 516 (1923), or soliciting, *International Shoe*, 326 U.S. at 314; *Green v. Chicago, Burlington & Quincy Ry.*, 205 U.S. 530 (1907), in the forum without more will not support an exercise of jurisdiction. Thus, building upon a constitutional precipice that would permit exercise of universal jurisdiction over any business advertising in a national media, the Ninth Circuit's test for the second prong of the specific jurisdiction standard emerges to contravene the fourteenth amendment.

B. The Ninth Circuit's Decision Vitiates the Distinction Between General and Specific *In Personam* Jurisdiction

The Ninth Circuit held below that, for the purpose of satisfying the second prong of the specific jurisdiction

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[2] Indeed, the Chamber is aware of no record evidence that establishes that the Shutes, in fact, relied upon any of Carnival's contacts with Washington in purchasing their cruise tickets.

standard, a cause of action arises out of [3] activities in the forum where those activities are a "but for" cause of the injuries that are the subject of the litigation. *Shute*, 897 F.2d at 383-86. Contrary to the due process clause of the fourteenth amendment, however, the Ninth Circuit's "but for" test nullifies the distinction between general and specific jurisdiction.[4]

The nomenclature of "specific" and "general" jurisdiction was first adopted by the Court in *Helicopteros Nacionales de Colombia*, although the distinction between jurisdiction based on a defendant's continuous and systematic presence in the forum, and jurisdiction based on lesser forum contacts that give rise to the litigation, was recognized in *International Shoe*, 326 U.S. at 318. Indeed, the distinction predates that decision. *Id.* (and citations therein). Thus, while the Court on occasion has noted the absence of a sufficient relationship between a defendant's forum contacts and the litigation to support jurisdiction, *see, e.g., Shaffer v. Heitner*, 433 U.S. 186, 213 (1977) (shareholder's derivative suit against out-of-state directors not "related to" directors' stock sequestered in the forum); *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) (action regarding out-of-state trustee's administration of a trust did not "arise out of" unilateral actions of the in-state settlor), the Court has not, either before or after *Helicopteros Nacionales de Colombia*, expressly enunciated why, in exercising specific jurisdiction, a relationship between a defendant's forum contacts and the litigation is necessary to satisfy the mandates of due process.

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[3] Because the Washington long-arm statute extends to the full extent permitted by due process, *Shute v. Carnival Cruise Lines*, 113 Wash. 2d 763, 783 P.2d 78 (1989), the Ninth Circuit apparently construed the words "arising out of" in the statute to be synonymous with the "arising out of or relating to" standard enunciated by this Court, *Shute*, 897 F.2d at 383-86, although the words "relating to" do not, in fact, appear in the statute. Wash. Rev. Code Ann. § 4.28.185 (1988).

[4] *Cf. Marino v. Hyatt Corp.*, 793 F.2d 427, 430 (1st Cir. 1986).

The Court, however, implicitly recognized the genesis of the second prong of the specific jurisdiction standard when it heralded the modern law of jurisdiction in *International Shoe*. There, the Court stated:

> But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protections of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

International Shoe, 310 U.S. at 319. Thus, where due process requires a connection between a defendant's forum contacts and the litigation, the requirement arises because the benefits and protections the defendant enjoyed were confined to its limited activities with respect to the forum, and, accordingly, the concomitant obligations the defendant assumed similarly were limited to those same activities. Therefore, the required connection between the defendant's forum contacts and the litigation has its foundation in an exchange of benefits and obligations between the defendant and the forum, *see generally Hanson*, 357 U.S. at 252 ("this suit cannot be said to be one to enforce an obligation that arose from a privilege the defendant exercised [in the forum]"), a relationship the Court recently analogized, in construing related principles of jurisdiction, as contractual. *Burnham v. Superior Court of California*, 110 S. Ct. 2105, 2117 (1990) ("[w]e daresay a contractual exchange swapping those benefits for that power would not survive the 'unconscionability' provision of the Uniform Commercial Code"); *see also id.* at 2125 n.14 (Brennan, J., concurring) (the opinion of the Court "maintains that, viewing transient jurisdiction as a contractual bargain, the rule is 'unconscionabl[e]'")

(alteration in original).[5] It is through disregarding this fundamental exchange of benefits and obligations between the defendant and the forum that the Ninth Circuit's "but for" test undermines the distinction between general and specific jurisdiction.

The "but for" test permits a plaintiff to maintain a cause of action where the plaintiff's injury bears no relationship, based upon reason or common experience, to a defendant's limited activities in the forum. Indeed, as one commentator noted, " 'the [but for] causes of an event go back to the discovery of America and beyond.' " Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 Sup. Ct. Rev. 77, 92 (quoting W. Prosser & P. Keeton, *The Law of Torts* 567 (4th ed. 1971)). In the absence of any real nexus between a defendant's forum contacts and the plaintiff's injury, the "but for" test disregards the limitations inherent in the exchange of benefits and obligations between the defendant and the forum—in effect, rendering a defendant subject to an exercise of general jurisdiction for essentially any cause of action based only on the showing of "purposefully directed" activities toward the forum required by the first prong of the specific jurisdiction standard. By obviating the general jurisdiction requirement for a "continuous and systematic presence" in the forum, the Ninth Circuit's "but for" test vitiates the constitutionally mandated distinction between specific and general jurisdiction.

Just as "technological progress" and the increased "flow of commerce" mandated the casting-off of outmoded theories of jurisdiction in *International Shoe* (*see Hanson*, 357 U.S. at 250-51), so too the distinction between specific and general jurisdiction must, contrary to the "but for" test, remain consonant with the contemporary market-

[5] This exchange of benefits and obligations underlying the second prong of the specific jurisdiction standard, of course, goes hand-in-hand with the considerations of predictability discussed in part I-C, *infra*.

place. Through failing to account for fundamental changes in the marketplace wrought by technology's ready access even to small businesses, the "but for" test disregards this Court's admonition that due process "can be as readily offended by the perpetuation of ancient forms that are no longer justified as by the adoption of new procedures that are inconsistent with the basic values of our constitutional heritage." *Shaffer*, 433 U.S. at 212.

As we enter the twenty-first century, once cutting-edge business practices are giving way to the full maturing of the "technological age." Advertising can no longer be circumscribed within a local jurisdiction: cable broadcasters now retransmit local television to foreign jurisdictions without the consent of the local station or the advertiser, and once local newspapers now commonly are available in many other communities' public libraries. Capital markets permit an investor, with the push of a button on a personal computer, to direct a broker in another state to purchase securities, while that broker, within minutes and again through the push of a button, effects the purchase in a third state, where the bargain is most favorable. Commodities, for example crude oil, are traded several times in the same day between purchasers and sellers in as many states, while the oil itself maintains an unchanging course in an ocean tanker.

Through this integration of technology, the conduct of business routinely traverses jurisdictional boundaries in the absence of the parties exchanging goods or services there. As previously established, technological progress cannot be permitted to shift the jurisdictional center of gravity away from the locus of the exchange of goods and services. *International Shoe*, 326 U.S. at 314, 318; *Rosenberg Bros.*, 260 U.S. 516; *Green*, 205 U.S. 530. Conversely, a "but for" test that permits such incidental contacts to support an exercise of specific jurisdiction impermissibly allows the advance of technology to render the distinction between specific and general jurisdiction

meaningless and, thereby, to retard continued progress in the marketplace.

C. The Ninth Circuit's Decision Violates Due Process Standards of Fair Play and Substantial Justice

The "constitutional touchstone," *Burger King*, 471 U.S. at 474, of the due process limitation on *in personam* jurisdiction is whether an exercise of jurisdiction "offend[s] 'traditional notions of fair play and substantial justice.'" *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 113 (1987) (quoting *International Shoe*, 326 U.S. at 316). This Court has held that accepted notions of fairness and justice require that application of state long-arm statutes provide "'a degree of predictability . . . that allows potential defendants to structure their primary conduct with some minimum assurance as to where . . . conduct will and will not render them liable to suit.'" *Burger King*, 471 U.S. at 472 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)).

As Justice Stevens noted in his concurrence in *Shaffer v. Heitner*, such predictability, or notice:

> [I]ncludes fair warning that a particular activity may subject a person to the jurisdiction of a foreign sovereign. If I visit another State, or acquire real estate or open a bank account in it, I *knowingly assume some risk* that the State will exercise its power over my property or my person while there. My contract with the State, though minimal, gives rise to *predictable risks*.

433 U.S. at 218 (emphasis added). *See also Burnham*, 110 S. Ct. at 2124 (Brennan, J., concurring). Such predictable risks afford a defendant "clear notice that it is subject to suit [in the forum], and [thereby, it] can act to alleviate the *risk* of burdensome litigation by procuring insurance, passing the expected costs on to customers, or,

if the *risks* are too great, severing its connection with the State." *World-Wide Volkswagen*, 444 U.S. at 297 (emphasis added).

The Ninth Circuit's "but for" test does not comport with this due process mandate of predictability required by accepted notions of fairness and justice, inasmuch as it permits a plaintiff to maintain a cause of action so attenuated from the defendant's actions in the forum as to exceed any reasonable "jurisdictional risk"[6] the defendant assumed based upon its limited contacts with the forum. The "but for" test thus allows an exercise of jurisdiction in circumstances that go far beyond the expectations that the ordinary commercial experience of potential defendants supports.

This disregard of the jurisdictional risk a defendant assumes, the Chamber's inquiry among its members revealed, bears particularly hard on small businesses—which do not operate in national markets and are left without any accessible standard upon which to "structure their primary conduct," *Burger King*, 471 U.S. at 472, and upon which to predict where they may be subject to suit. A few simple examples, typical of the Chamber's many small business members, aptly illustrate their plight under the Ninth Circuit's "but for" test.[7]

The Ninth Circuit's "but for" test would permit an Oregon district court to exercise jurisdiction over a small Washington manufacturer whose only contact with Oregon was that it shipped its products through the state by truck for sale in California, where they injured a visiting Oregon plaintiff. Under the Ninth Circuit's test, the suit would satisfy the second prong of the specific

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[6] *See* Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 649 (1988).

[7] In contrast, most large national businesses are subject to suit in essentially all states.

jurisdiction standard, inasmuch as, in the absence of the manufacturer's transporting its products through Oregon, the injuries would not have occurred.[8]

Similarly, a small Alaskan charter airline could be subject to suit in California where a California plaintiff was injured on one of the airline's flights, despite that the airline's only contact with California was its advertisement in a national fishing magazine. Under the Ninth Circuit's "but for" test, the suit again would satisfy the second prong of the specific jurisdiction standard, inasmuch as the airline's solicitation in California was a but for cause of the claimed injuries.

Finally, a small Ohio wholesaler of specialty machine parts could be subject to a tortious breach of contract suit in California despite that its only contact with California was that, pursuant to a contract with an Ohio manufacturer, it delivered machine parts to the manufacturer's subcontractor in California. Under the Ninth Circuit's "but for" test, this suit as well would satisfy the second prong of the specific jurisdiction standard, because, but for the delivery of the machine parts, the litigation would not have arisen.[9]

In the above examples, permitting a court to exercise specific jurisdiction over the defendant in derogation of the jurisdictional risk the defendant assumed based upon

[8] In this example, the manufacturer's transporting its products through Oregon is not, strictly speaking, a "but for" cause of the Oregon resident's injuries—that is, the products could have arrived through another route. However, the example satisfies the "but for" test as applied by the Ninth Circuit, which held that Carnival's solicitation in Washington was a "but for" cause of the Shutes' injuries, despite that nothing in logic or physical science requires such solicitation as a prerequisite to the Shutes' injuries. *Shute*, 897 F.2d at 383-86.

[9] This example further illustrates the absurd results the Ninth Circuit's "but for" test could compel, inasmuch as, under the test, the Ohio wholesaler could be subject to suit in any of the states through which its machine parts traveled en route to California.

its limited contacts with the forum clearly contravenes " 'traditional notions of fair play and substantial justice.' " *Asahi*, 480 U.S. at 113 (citations omitted). In each example, the defendant is held subject to suit in the plaintiff's chosen forum without any basis from reasonable commercial experience upon which to predict that it could be subject to suit there.[10]

Moreover, permitting a court to exercise jurisdiction in such cases effectively, and impermissibly, absolves the plaintiff of any jurisdictional risk: while maintaining its choice of forum, the plaintiff may, with impunity, choose to do business with a nonresident defendant without inquiring whether the defendant maintains any genuinely-related forum contacts. It is manifestly unfair for a plaintiff to be absolved of all jurisdictional risk where the plaintiff (perhaps after reading an out-of-state newspaper available at its local airport) reaches beyond its own state to conduct business with the defendant, but nonetheless is permitted to hale the defendant into the plaintiff's own courts based upon some incidental contact with the forum that, likely through little more than coincidence, happens to satisfy the Ninth Circuit's expansive "but for" test.

In contradistinction, as this Court has recognized, and as the Ninth Circuit effectively disregards, due process

[10] The Ninth Circuit's application of a "reasonableness" test to the exercise of *in personam* jurisdiction, *Shute*, 897 F.2d at 386, does not effectively ameliorate the unfairness and injustice of the above examples, because, under the Ninth Circuit's test, a rebuttable presumption of "reasonableness" arises when "purposeful availment" of the forum's laws is established. *Id.*

Moreover, even in the absence of a rebuttable presumption of reasonableness, as this case illustrates, such a reasonableness test subsumes the second prong of the specific juridiction standard. Such a reasonableness test, however, lacks sufficient specificity to provide a meaningful constitutional guide. Indeed, in apparent recognition of this point, the Court in *International Shoe* adopted the minimum contacts test as a standard for insuring that the exercise of jurisdiction was reasonable. 326 U.S. at 320. *See also Burnham*, 110 S. Ct. at 2122 & n.7 (Brennan, J., concurring).

considerations of the defendant's forum contacts include consideration of the plaintiff's conduct with respect to the defendant. In *Kulko v. Superior Court of California*, 436 U.S. 84 (1978), where a former wife left the marital domicile and relied upon a state long-arm statute to establish jurisdiction in a child custody suit against her former husband who had remained in the marital domicile, the Court noted that "basic considerations of fairness" pointed against the former wife's assertion of jurisdiction, inasmuch as "[i]t is [the former husband] appellant who has remained in the State of the marital domicile, whereas it is [the former wife] appellee who has moved across the continent." *Id.* at 97 (citing *May v. Anderson*, 345 U.S. 528, 534-35 n.8 (1953)). Similarly, on other occasions the Court has looked to the "minimal interests on the part of the plaintiff," *Asahi*, 480 U.S. at 115, and the "defendant's relationship with the plaintiff," *Keeton*, 465 U.S. at 780, in considering due process limitations on long-arm jurisdiction. Thus, the Ninth Circuit's "but for" test, through permitting an exercise of jurisdiction far in excess of the jurisdictional risk the defendant assumed in its dealings with the forum, and concomitantly with the plaintiff, violates due process standards of fair play and substantial justice.

D. The Ninth Circuit's Decision Contravenes Due Process Limitations on State Power that Ensure Orderly Administration of the Laws

Due process limitations on the exercise of *in personam* jurisdiction "have long relied on the principles traditionally followed by American courts in marking out the territorial limits of each State's authority." *Burnham*, 110 S. Ct. at 2110. Following adoption of the fourteenth amendment, a court's exercise of jurisdiction was considered "restricted by the territorial limits of the State in which it [was] established," *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878), and thereby the fourteenth amendment provided " 'for the protection and enforcement of private

rights', including the 'well-established principles of public law respecting the jurisdiction of an independent State over persons and property.' " *Burnham*, 110 S. Ct. at 2110 (quoting *Pennoyer*, 95 U.S. at 733, 722). Such strict territorial limits on a court's jurisdiction, however, gave way in *International Shoe* to jurisdiction based upon "minimum contacts" and " 'traditional notions of fair play and substantial justice.' " *International Shoe*, 326 U.S. at 316 (citations omitted). Nonetheless, this Court has recognized that the concept of "fair play and substantial justice" is the "classic expression of the criterion" announced in *Pennoyer* (*Burnham*, 110 S. Ct. at 2110), and that minimum contacts act as a "substitute for physical presence." *Id.* at 2115.

In establishing minimum contacts in part as a surrogate for physical presence, *International Shoe* and its progeny continue to recognize the fourteenth amendment's restriction on state power. Thus, the Court has stated that the fourteenth amendment's "restriction on state sovereign power . . . however, must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause" and not a function of "federalism concerns." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 n.10 (1982). *See also Burger King*, 471 U.S. at 472 n.13. Accordingly, the fourteenth amendment envisions that, through protecting individual liberty interests, due process restricts state power of the forum state, in turn protecting the powers of other states, *cf. World-Wide Volkswagen*, 444 U.S. at 293-94, and, thereby, ensuring the "fair and orderly administration of the laws." *International Shoe*, 326 U.S. at 319; *see also Asahi*, 480 U.S. at 113 (considering the interstate judicial systems interest in obtaining the most efficient resolution of the controversy).[11]

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[11] This due process restriction on state power stemming from protection of individual liberty interests is distinguishable from

The Ninth Circuit's decision, however, fails properly to protect a defendant's individual liberty interests, and, therefore, the decision contravenes these important due process limitations on state power. The liberty interests that the due process clause protects emanate from two sources: the due process clause itself and the laws of the states. *Hewitt v. Helms*, 459 U.S. 460, 466, 470-71 (1983) (citing *Meachum v. Fano*, 427 U.S. 215, 223-27 (1976)). Since *International Shoe*, it has been recognized that the due process clause itself protects a defendant's liberty interest in not being haled before a court and being subject to binding judgments in a distant jurisdiction where no minimum contacts are maintained. *International Shoe*, 326 U.S. at 319; *Burger King*, 471 U.S. at 471-72. As established in part I-C, *supra*, the Ninth Circuit's "but for" test deprives a defendant of this liberty interest and thereby fails properly to limit state power through permitting exercise of jurisdiction with respect to a cause of action that bears no relationship to a defendant's activities in the forum.

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federalism concerns that limit state power in areas other than jurisdiction, inasmuch as a defendant may waive due process protections to liberty interests—through, for example, assuming the jurisdictional risk of the litigation—whereas limitations on state power stemming from federalism cannot be waived by an individual. *Insurance Corp. of Ireland*, 456 U.S. at 702-03 n.10.

The fact that such due process protections to liberty interests may be waived, however, does not mitigate the jurisdictional importance of the resulting due process limitations on state power. As discussed below, many of the protected liberty interests implicated by specific jurisdiction arise by force of the state law of a non-forum state, for example, the defendant's home state. Thus, although afforded by sovereign acts of the defendant's home state, these liberty interests may be waived by the defendant both within and without its home state, and, accordingly, there is no affront to the home state's sovereignty if the defendant effects a waiver outside the state which it similarly could have effected within the state if the litigation were brought there.

Equally important, however, the Ninth Circuit's "but for" test also deprives a defendant of due process protections of liberty interests arising under state law—for example, those interests arising under the laws of the defendant's home state. In *Paul v. Davis*, 424 U.S. 693 (1976), the Court stated:

> It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status.

Id. at 710-11 (footnote omitted). Accordingly, a constitutionally-protected interest has been found to arise under state law where, by issuing driver's licenses, a state affords the right to drive an automobile on state highways. *Bell v. Burson*, 402 U.S. 535 (1971); *see also Paul*, 424 U.S. at 711 (citing *Bell*).[12] Similarly, a liberty interest has been found to arise by virtue of rights afforded under state regulations regarding the conditions of criminal confinement, although no independent liberty interest arose under the Constitution. *Hewitt*, 459 U.S. at 469; *see also Wolff v. McDonnell*, 418 U.S. 539, 556-57

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[12] Although the Court in *Bell* does not expressly identify whether the interest derived from a state's issuing driver's licenses is a liberty or property interest, or both, the Court does state that, once issued, continued possession of a driver's license "may become essential in the pursuit of a livelihood," *Bell*, 402 U.S. at 539, which this Court has recognized as a federal liberty interest. *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). Moreover, both the Ninth Circuit in *Schuman v. California*, 584 F.2d 868, 870 (9th Cir. 1978), and the First Circuit in *Raper v. Lucey*, 488 F.2d 748, 751 (1st Cir. 1973), have denominated the right to use a motor vehicle as a federal liberty interest protected under 42 U.S.C. § 1983 (1988).

(1974) (Constitution does not guarantee good-time credits while in prison, but state had created a liberty interest in such good-time credits).

The Ninth Circuit's decision, by subjecting a defendant to suits in a distant and unrelated forum, deprives a defendant of important liberty interests afforded by its home state.[13] These state-granted liberty interests, although varying from state to state, may include the right to access to the state's courts for fundamental matters such as those affecting the family, the right to a trial by a jury of the defendant's peers residing in the state, or, in some instances even a trial before an elected judge. *Cf. Burnham*, 110 S. Ct. at 2125 and n.12 (Brennan, J., concurring) (protection of a state's laws and the right to access to its courts, although protected by the privileges and immunities clause, need not be ignored for purposes of determining the fairness of transient jurisdiction); *International Shoe*, 326 U.S. at 320 (defendant "received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights").[14] Additionally, such state-granted liberty interests may include the protection of a unique statute of limitations, or other similar procedural guarantees. *Cf. Keeton*, 465 U.S. at 778 & n.10. Although this Court has never expressly recognized these state-granted liberty interests, such interests should no less rise to the level of a constitutionally-protected interest than the interest in obtaining a driver's license recognized in *Bell*.

[13] Pursuant to the previous analysis, individual liberty interests implicated by due process may arise by force of the laws of a non-forum state (other than the defendant's home state) with which the defendant maintains genuinely-related forum contacts.

[14] The Court in *Boddie v. Connecticut*, 401 U.S. 371 (1970), addressed the right to access to state courts although the case did not involve a liberty interest afforded by state law, but, rather, involved the failure of a state's laws to provide the indigent free access to its courts to obtain a divorce. Thus, the Court in *Boddie* addressed not whether a liberty interest arose under state law but whether denial of access to the state's courts violated procedural due process. *Id.* at 380.

Thus, the Ninth Circuit's disregard of these liberty interests, arising under both the due process clause itself and under state law, violates the fourteenth amendment and, therefore, contravenes important limitations on state power. These limitations on state power act not only to prevent overreaching by the forum state, but, in turn, to protect the power of non-forum states—a balance necessary for the just administration of the law.

E. The Ninth Circuit's Jurisdictional Test Will Harm Small Businesses

A guiding force in this Court's enunciation of the modern law of *in personam* jurisdiction has been the need to adapt the law to the contemporary marketplace. *World-Wide Volkswagen*, 444 U.S. at 293-94; *Hanson*, 357 U.S. at 250-51. The Ninth Circuit's ruling, through disregarding the locus of the exchange of goods and services, fails to account for the realities of the contemporary marketplace and will have substantial detrimental impact on small businesses and the persons they employ.

A small business that has no reasonable basis upon which to gauge its jurisdictional risk must therefore protect against all conceivable risks—risks that grow exponentially as the ability to circumscribe advertising to a local jurisdiction fast vanishes. The Chamber's inquiry among its small business members revealed that the cost of protecting against these risks will be prohibitive for many small businesses.

The costs the Ninth Circuit's decision imposes on small businesses include substantially increased insurance costs to protect against suits in foreign jurisdictions arising from foreign law. If the Ninth Circuit's ruling is upheld by this Court, small businesses may be the next casualties of the national insurance crisis. Small busi-

nesses will have to bear the direct costs—which for them will be exorbitant—of implementing compliance with unique and unfamiliar laws in foreign jurisdictions with which they have only the most minimal of contacts.[15]

Additionally, the Ninth Circuit's ruling requires small businesses to bear alone the substantial cost of defending a suit in a distant forum. Such a result is both inequitable and economically inefficient in that it is the tort plaintiff who is best able to bear the cost of suing in a distant forum because the plaintiff more likely will be able to retain legal services on a contingency basis there.

Finally, the detrimental impact of the Ninth Circuit's ruling on small businesses contravenes long-standing national policy to "protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise." 15 U.S.C. § 631(a) (1988). It is small businesses that are the source of economic innovation and renewal that is the life-blood of the American economy. Indeed, according to the Chamber's statistics, the United States has nineteen million small businesses that employ six out of every ten workers, create sixty-four percent of new jobs, and provide two out of every three workers their first job. Small businesses similarly account for twenty-one percent of the total United States manufacturing output, and account for more than twelve percent of the value of United States goods exported directly by manufacturers. The Ninth Circuit's jurisdictional test poses a definite and serious threat to the continued health of this national resource.

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[15] Although applicable choice of law provisions could reduce this cost, a small business nonetheless must protect against possible application of a foreign forum's law because choice of law provisions generally favor the forum state's law. Twitchell, *supra* note 6, at 664 (citing Peterson, *Proposals of Marriage Between Jurisdiction and Choice of Law*, 14 U.C. Davis L. Rev. 869, 871 & nn.14-15 (1981)).

II. THE COURT SHOULD ADOPT A TEST FOR THE SECOND PRONG OF THE SPECIFIC JURISDICTION STANDARD THAT REFLECTS THE FUNDAMENTAL EXCHANGE OF OBLIGATIONS AND BENEFITS BETWEEN THE DEFENDANT AND THE FORUM THAT UNDERLIES SPECIFIC JURISDICTION

In referring to the second prong of the specific jurisdiction standard, the Court in *Helicopteros Nacionales de Colombia, S.A., v. Hall*, expressly declined to address, as not properly before the Court, the appropriate test for applying the second prong of the specific jurisdiction standard. The Court stated:

> Absent any briefing on the issue, we decline to reach the questions (1) whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum, and (2) what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists. Nor do we reach the question whether, if the two types of relationship differ, a forum's exercise of personal jurisdiction in a situation where the cause of action "relates to," but does not "arise out of," the defendant's contacts with the forum should be analyzed as an assertion of specific jurisdiction.

466 U.S. at 415-16 n.10. Last term, however, the Court variously referred to the second prong of the specific jurisdiction standard as a "litigation-relatedness requirement," *Burnham*, 110 S. Ct. at 2116, 2114, suggesting a recognition of the difficulties in adopting a purely formalistic test focusing on the logical relationships implicated by the phrases "arising out of" or "related to." Indeed, as the Ninth Circuit's "but for" test reveals, it is in establishing the interrelatedness of human occurrences that logical constructs are perhaps least well suited. As

the Court noted in *Kulko v. Superior Court*, the determination of jurisdiction "is not susceptible of mechanical application" and "is one in which few answers will be written 'in black and white. The grays are dominant and even among them the shades are innumerable.'" 463 U.S. at 92; *see also Burger King*, 471 U.S. at 478 ("[t]he Court long ago rejected the notion that personal jurisdiction might turn on 'mechanical' tests").

In view of the difficulties in adopting a formalistic approach to applying the second prong of the specific jurisdiction standard, the Court, in adopting an appropriate test, should look to the fundamental exchange of benefits and obligations between the defendant and the forum that provides the basis for specific jurisdiction. *See supra* part I-B. This underlying basis for specific jurisdiction necessarily includes consideration of the jurisdictional risk the defendant assumed, due process limitations on state power that ensure orderly administration of the laws, and the need to adopt the law to the contemporary marketplace.

An appropriate test for applying the second prong of the specific jurisdiction standard for determining when "the litigation results from alleged injuries that 'arise out of or relate to'" a defendant's "purposefully direct[ing] his activities [at] the forum," *Burger King*, 471 U.S. at 472, is: whether the defendant, through his activities, may be deemed to have assumed the risk of the litigation in the forum. *See generally Shaffer*, 433 U.S. at 218 (through its contacts with the forum a defendant "knowingly assume[s] some risk" that the forum will exercise jurisdiction). The test is objective and, thus, looks not merely to a defendant's actual consent to jurisdiction, *see Insurance Corp. of Ireland*, 456 U.S. at 704-05 ("[t]he actions of the defendant may amount to a legal submission to the jurisdiction of the court, whether voluntary or not"), but, rather, looks to whether, through its activities, a similarly situated defendant reasonably would have anticipated the risks of litigation in the forum. *See generally World-Wide Volkswagen*, 444 U.S. at 297. Such a test should consider the role of the plaintiff in the forum-related activities in order to protect against the untenable result wherein a plaintiff, perhaps after viewing an advertisement on a retransmitted cable broadcast, reaches outside its forum to the defendant but nonetheless is absolved of any jurisdictional risk.

Unlike the Ninth Circuit's "but for" test, the above test uniquely compliments the fundamental jurisdictional principles underlying the second prong of the specific jurisdiction standard. Most importantly, it clearly maintains the line between general and specific jurisdiction through maintaining the essential role of the exchange of benefits and obligations between a defendant and the forum and remains consonant with the locus of the exchange of goods and services. Thus, where a defendant has been afforded a benefit by the forum with respect to certain activities, the defendant reasonably is charged with assuming the risk of litigation regarding those activities. *International Shoe*, 310 U.S. at 319.

This test comports with due process standards of fair play and substantial justice in that it cannot be deemed fundamentally unfair to charge a defendant with the responsibility for the very risks of distant litigation it knowingly or constructively assumed through its contacts with the forum. Similarly, the test also preserves appropriate limitations on state power, and, concomitantly, the orderly administration of the laws, inasmuch as a defendant is deprived of only those individual liberty interests (whether they emanate from the due process clause itself or state law) which the defendant knowingly or constructively waived through its assumption of the risk of the litigation. Finally, the test adapts to the changing contemporary marketplace because it permits businesses, particularly small businesses, to protect against known or knowable risks, and obviates the necessity, as under the

Ninth Circuit's "but for" test, to assume the substantial cost of protecting against all conceivable risks. *See supra* part I-E.

The very facets of such a jurisdictional risk test that ensure its efficacy, however, preclude the Court's applying the test to this case in its present procedural posture. Because the test is not formalistic and is consonant with the greys and their innumerable shades attaching to the determination of jurisdiction, *Kulko*, 436 U.S. at 92, fundamental fairness requires that the parties be afforded the opportunity to present to the trial court those facts that bear upon Carnival's assumption of the risk of the litigation in Washington. Although the parties have presented evidence regarding Carnival's purposefully directed activities at Washington, the character of that evidence, and the responses thereto, presented by both parties very well may differ with respect to Carnival's assumption of the risk of the litigation through those activities. Accordingly, this Court's decisions recognize that both parties should be afforded an opportunity to present such evidence before the trial court regarding whether an exercise of jurisdiction over Carnival satisfies the above test. *See generally Pinter v. Dahl*, 486 U.S. 622, 639-41 (1988).

CONCLUSION

For the reasons stated above, the Court should reverse the decision of the United States Court of Appeals for the Ninth Circuit and remand for further proceedings.

Respectfully submitted,

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